Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

NANCY E. HARBERT

Petitioner

v.

HEALTHCARE SERVICES GROUP, INC.

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A majority of a three-judge panel of the Tenth Circuit reversed the district court's finding that the Department of Labor's ("DOL") regulation defining "worksite," 29 C.F.R. § 825.111(a)(3), is a valid and enforceable implementation of the Family and Medical Leave Act ("FMLA" or "Act"), 29 U.S.C. § 2601 *et seq.*, as applied to all joint employees. In so doing, the majority struck down the regulation as arbitrary and capricious as that regulation is applied to joint employees, such as the Petitioner, Nancy Harbert, who work at what the majority considered to be a "fixed" place of work.

A single question is presented:

Is the DOL's regulation defining "worksite," 29 C.F.R. §825.111(a)(3), a valid and enforceable implementation of the FMLA as applied to all joint employees, including joint employees who have "fixed" or generally "fixed" places of work?

LIST OF PARTIES

The parties below are listed in the caption. In addition, the United States Department of Labor appeared as *amicus curiae* in support of the validity and enforceability of its regulation.

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CITATIONS OF OPINIONS AND ORDERS BELOW

The majority opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004). The original unpublished Tenth Circuit opinion was dated and filed December 13, 2004, *see* Appendix A, and it reversed and remanded the United States District Court for the District of Colorado's decision regarding the validity and enforceability of the DOL's regulation defining worksite for joint employees. The district court's decision by Judge Kane was not published but reported and filed as "Findings of Fact, Conclusions of Law and Order," *Harbert v. Healthcare Services Group, Inc.*, No. 00-K-908 (D.Colo. dated and filed March 13, 2003). *See* Appendix B.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

The Tenth Circuit's opinion was issued on December 13, 2004. *See* Appendix A. On March 2, 2005, the Tenth Circuit denied Nancy Harbert's petition for rehearing en banc. *See* Appendix C.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. **Title 29 Code of Federal Regulations, Section 825.111(a)(3).**

   How to determine whether the primary employer of a joint employee employs 50 employees within 75 miles of the joint employee's worksite.

   For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the

employee's worksite is the primary employer's office from which the employee is assigned or reports.

2. **Title 29 United States Code, Section 2601(b)**

Family and Medical Leave Act – Purposes.

It is the purpose of this Act—

> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
>
> (2) to entitle employees to take reasonable leave for medical reasons, . . .;
>
> (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers; . . . .

3. **Title 29 United States Code, Section 2611(2)(B)(ii).**

Exclusions from FMLA eligibility.

The term "eligible employee" does not include—

. . .

any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

4. **Title 29 United States Code, Section 2654.**

Family and Medical Leave Act - Regulations.

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

5. **Title 20 Code of Federal Regulations, Section 639.3(i)(6)**

A definition of "single site of employment."

For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

6. The provisions of 29 C.F.R. § 825.106 that define and discuss joint employment are rather lengthy and, thus, set forth in Appendix D, pursuant to Supreme Court Rule 14.1(f). The full text of 29 C.F.R. § 825.111 (determining FMLA eligibility under the 50 employee/75-mile radius provision) and that of 20 C.F.R. § 639.3(i) (WARN Act regulations defining "single site of employment") are set forth in Appendices E and F, respectively, pursuant to Supreme Court Rules 14.1(f) and 14.1(i)(vi). Relevant excerpts of the FMLA's legislative history are set forth in Appendices G and H, pursuant to Supreme Court Rule 14.1(i)(vi).

STATEMENT OF THE CASE

1. Petitioner Nancy Harbert brought her original action against Respondent Healthcare Services Group, Inc. ("HSG") in the United States District Court for the District of Colorado for violating federal law under the FMLA. Federal jurisdiction was not contested, and such jurisdiction was founded upon 28 U.S.C. § 1331 and 29 U.S.C. § 2617(a)(2).

2. Nancy Harbert was employed by HSG as an account manager to manage and supervise the housekeeping and laundry services at Sunset Manor—a nursing home located in Brush, Colorado. During her employment by HSG, Ms. Harbert sustained injuries that required a medical leave of absence from her job. Ms. Harbert requested FMLA leave, but HSG asserted that Ms. Harbert was not eligible for such leave and denied her request. HSG based its denial of eligibility on the 50 employee/75-mile radius provision of the FMLA. *See* 29 U.S.C. § 2611(2)(B)(ii).[1] HSG then terminated Ms. Harbert when she was unable to obtain authorization from her doctor for a return to full-duty work. HSG terminated Ms. Harbert after providing her with less than 12 weeks of leave.[2] Ms. Harbert brought a civil action against HSG for violating the FMLA.

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[1] For the exact text of the 50/75 provision of the FMLA, see *supra* pp. 2-3. This provision acts as an exception to FMLA eligibility for employees who are employed by a small business or a business with smaller, scattered operations such that the business employs less than 50 employees within a 75-mile radius of the employer's worksite. *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1148 (10th Cir. 2004) (discussing the legislative intent of the 50/75 provision).

HSG employed less than 50 employees within a 75-mile radius of Sunset Manor in rural Brush, Colorado. HSG, however, employed many more than 50 employees within a 75-mile radius of its regional office in Golden, Colorado. *See Harbert*, 391 F.3d at 1144.

[2] Under the FMLA, an eligible employee is entitled to take up to a maximum of 12 weeks of leave within a 12-month period. *See* 29 U.S.C. § 2612(a)(1).

3. HSG's primary defense was that it did not employ 50 or more employees within a 75-mile radius of Sunset Manor in Brush, Colorado. After a bench trial, the district court found that Nancy Harbert was a joint employee of both HSG and Sunset Manor and that HSG was Ms. Harbert's primary employer.[3] *See* "Findings of Fact, Conclusions of Law and Order," Appendix B at B-6 – B-7; *see also Harbert v. Healthcare Services Group, Inc.*, 173 F.Supp.2d 1101, 1105-06 (D.Colo. 2001) (published memorandum opinion of the district court discussing joint employment and the economic realities test in connection with both parties' motions for summary judgment on the joint employment question). In addition, the district court upheld as valid and enforceable the DOL's regulation that defined "worksite" for joint employees as the "primary employer's office from which the employee is assigned or reports."[4] *See* Appendix B at B-7; *see also Harbert*, 173 F.Supp.2d at 1106 (upholding the validity of the DOL's construction of the term "worksite" for joint employees in regulation 825.111(a)(3)). Ms. Harbert was assigned from and reported to HSG's regional office in Golden, Colorado; and HSG employed many more than 50 employees within a 75-mile radius of its regional office. *See* Appendix B at B-2. Accordingly, the district court found that Ms. Harbert was eligible for FMLA leave and awarded her damages. *See* Appendix B at B-2, B-7 – B-8.

4. The sole question on HSG's appeal to the Tenth Circuit was the validity and enforceability of the DOL's regulation defining "worksite" for joint employees. *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1146 (10th Cir. 2004). The Secretary of Labor filed an *amicus curiae* brief in support of its regulation and the district court's decision upholding the validity and enforceability of the regulation. Two of the three Tenth Circuit judges who reviewed the case found that the regulation was arbitrary, capricious, and contrary to the FMLA as

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[3] The terms "joint employment" and "primary employer" are defined and discussed in the DOL's regulations implementing the FMLA at 29 C.F.R. § 825.106. *See* Appendix D.

[4] 29 C.F.R. § 825.111(a)(3).

applied to Nancy Harbert and other joint employees who have a "fixed" place of work. *See id.* at 1154. The third judge, however, dissented on that issue finding that the regulation was indeed permissible as applied. *See id.* at 1155 (Kelly, J., dissenting).

Nancy Harbert petitioned the Tenth Circuit for a rehearing of the matter en banc. Her request was denied by order of the court dated March 2, 2005. Judge Kelly, however, again dissented in the denial of Ms. Harbert's petition. *See* Appendix C.

REASONS FOR ALLOWANCE OF THE WRIT

Whether the DOL's regulation defining "worksite," 29 C.F.R. § 825.111(a)(3), is a valid and enforceable implementation of the FMLA as applied to all joint employees, including joint employees who have "fixed" places of work, warrants this Court's attention and review. This question is one of first impression. Neither this Court nor any other federal circuit has addressed the validity of the regulation at issue, and the question will certainly arise again. The decision to invalidate the regulation as applied was not unanimous. In fact, dissenting Judge Kelly specifically found that § 825.111(a)(3) was a "permissible exercise of agency rulemaking." *Harbert*, 391 F.3d at 1155. By declaring § 825.111(a)(3) invalid as applied to joint employees with "fixed" worksites, the two-judge majority of the Tenth Circuit panel seriously departed from the deference owed to an administrative agency's construction of a statute under the rule announced by this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "Declaring invalid a regulation that an agency has been charged with developing is strong medicine and only appropriate when the regulation is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Harbert*, 391 F.3d at 1154 (Kelly, J., dissenting). The majority's ruling not only stripped countless employees, like Nancy Harbert, from FMLA eligibility, but it also created greater uncertainty as to whether and what type of joint employees are eligible for FMLA leave. In particular, the majority judges added a new variable that will require defining—namely, what it means to have a "fixed" worksite. There must be certainty in the requirements of the FMLA in order for it to be fairly and efficiently applied and in order to achieve its purposes. This Court

has reviewed the validity of another FMLA regulation, 29 C.F.R. § 825.700(a), in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002). Likewise, this Court should grant certiorari in the case at issue to fully resolve the question of joint employees' worksites so that employees and employers alike will understand their respective rights and responsibilities under this very important employment statute.

Congress enacted the FMLA "to balance the demands of the workplace with the needs of families" by entitling employees to a reasonable minimum leave of absence for such reasons as medical and health conditions that affect the employee or a member of the employee's family. *See* 29 U.S.C. § 2601(b)(1) and (2). Congress also directed the Secretary of Labor to promulgate regulations necessary to implement the FMLA. *See* 29 U.S.C. § 2654. Pursuant to this Congressional mandate, the Department of Labor promulgated such regulations, including the regulations that filled important definitional and logistical gaps left in the Act by Congress. The definition of "worksite" and the definition and handling of various types of employment relationships under the FMLA, such as joint employment, are examples of the DOL's gap-filling regulations. While Congress used the term "worksite" in the text of the Act—in particular as a physical point of reference in determining employee eligibility under the 50 employee/75-mile radius ("50/75") provision, *see* 29 U.S.C. § 2611(2)(B)(ii),[5] —Congress did not define the term anywhere within the text of the FMLA. Congress did, however, provide guidance as to how the term "worksite" should be defined in House and Senate reports that accompanied the FMLA. Specifically, these reports state that the term "worksite" should be interpreted in the same manner as "single site of employment" under the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101(a)(3)(B), and its implementing regulations. *See* S. Rep. No. 103-3, 103rd Cong., 1st Sess. at 23, *reprinted in* 1993 U.S.C.A.A.N. 3, 25; *see also* H. R. Rep. No. 103-8(I), at 35 (1993) (virtually identical). Following Congress' guidance, the DOL looked to the WARN Act for the definition of "single site of employment," and a comprehensive definition of

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[5] *See supra* note 1.

that term was found in the WARN Act regulations at 20 C.F.R. § 639.3(i). The definition relevant here provides as follows:

> For workers whose primary duties require travel from point to point, *who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites* (e.g., railroad workers, bus drivers, salespersons), *the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.*

20 C.F.R. § 639.3(i)(6) (emphasis added). This definition of "single site of employment" for "outstationed" employees or employees "whose primary duties involve work outside any of the employer's regular employment sites," formed the basis for the DOL's definition of "worksite" with respect to joint employees at 29 C.F.R. § 825.111(a)(3).

I. The Tenth Circuit's opinion was divided.

The majority found that § 825.111(a)(3) is not valid as applied to Mrs. Harbert and others like her who are essentially outstationed employees "with a fixed place of work," *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004), and thus reversed the district court below. Judge Kelly, however, dissented, holding that § 825.111(a)(3) is a permissible and reasonable construction of the term "worksite," even for joint employees with "largely fixed" worksites, given Congress' delegation of authority to the Secretary of Labor to implement the FMLA, legislative history reflecting Congressional awareness of variations in joint employment relationships, and the regulation's promotion of certainty with respect to determining a joint employee's worksite. *See Harbert*, 391 F.3d 1154-55.

With respect to the validity of § 825.111(a)(3), all three Tenth Circuit judges analyzed the same legislative history, *see* S.R. Doc. No. 103-3; H.R. Doc. No. 103-8 (I), and applied the same legal standard under *Chevron*, 647 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. Nevertheless, the decision was split. While both factions acknowledged that "worksite" is not defined in the statute, the majority focused on its interpretation of the term's common meaning and its bright-line distinction between "fixed" and "non-fixed" worksites. Judge Kelly, however, focused more properly on the agency's authority to implement the FMLA by filling statutory gaps with reasonable regulations. As Judge Kelly noted, the majority's "ipse dixit that the Secretary's definition of the term "worksite" is contrary to common meaning fails to account for the many variations in joint employment relationships, from forever fixed to forever mobile." *Harbert*, 391 F.3d at 1155. The regulation, however, does account for such variations, and it provides a certain and uniform definition of "worksite" for more complex joint employment situations.

II. The majority's opinion failed to properly defer to the DOL' s reasonable interpretation of the FMLA and Congressional guidance.

Given the deference owed to an agency's construction of a statute, the majority admitted that this case "presents a very close question." *Id.* at 1149. Nevertheless, the majority engaged in a common-meaning analysis of "worksite" to conclude that the DOL's definition of the term as applied to joint employment relationships ran contrary to the legislative purpose of the 50/75 provision restricting FMLA eligibility. *See id.* at 1149-50. The majority also found that the DOL's regulation created an arbitrary distinction between sole employers and joint employers. *See id.* at 1150-51. The majority's opinion is not only too narrowly focused and fails to appreciate the realities and variation of modern employment relationships, but the rationale behind the opinion also contradicts the majority's holdings in dicta regarding related regulations and certain applications of the challenged regulation. Additionally, the majority's holding will create greater uncertainty as to the definition of "worksite" by injecting an arbitrary and further undefined distinction between "fixed" and "non-fixed" places of work.

The majority stated that the common meaning of the term "worksite" is "the site where the employee works." *Id.* at 1149. This "common meaning," however, is much too simplistic given modern employment realities. For employees who work out of their homes, the majority conceded that their worksite is not the site where they regularly work (i.e., their home), but "the site to which they are assigned as their home base, from which their work is assigned, or to which they report." 29 C.F.R. § 825.111(a)(2); *see Harbert*, 391 F.3d at 1150 n. 1. The majority even conceded that employees of temporary help agencies, joint employees as defined by the DOL at 29 C.F.R. § 825.106(b), have as their worksite "the primary employer's office from which the employee is assigned or reports." 29 C.F.R. § 825.111(a)(3); *see Harbert* 391 F.3d at 1153. Yet for joint employees like Ms. Harbert, the majority believed the "common meaning" of "worksite" should apply instead of the consistent, simply-applied and certain definition fashioned under Congressional authority by the DOL.

The majority deemed Ms. Harbert's assignment to Sunset Manor to be "fixed" as compared to an employee of a temporary help agency who, according to the majority, "does not have a permanent, fixed worksite." *Harbert*, 391 F.3d 1153. What then is a "fixed" worksite as compared to a non-fixed worksite? Can a non-fixed worksite become "fixed" if the employee works at that worksite long enough? What about an employee of a temporary help agency who receives a long-term assignment? Would that employee's place of work be considered "fixed;" or does the mere fact that the employee was employed by a temporary help agency make her worksite "non-fixed?" Is the "fixed" or "non-fixed" nature of the joint employee's assignment determined by the joint employer's type of business?[6] The distinction is anything but clear.

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[6] These questions concerning temporary help agencies or placement agencies are particularly significant because in defining "joint employment," the DOL stated that "joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer." 29 C.F.R. § 825.106(b). Moreover, in discussing the factors used to determine a joint employee's "primary employer," that (Cont'd)

(Cont'd)
is, the employer with the "authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits," § 825.106(c), the DOL also stated that the placement agency would usually be the primary employer for employees of temporary or leasing agencies. *See id.*

With respect to joint employees whose primary employer is a temporary help agency, the majority stated the following:

> [W]e do not question the validity of the joint employment provision . . . insofar as it applies to employees of temporary help agencies. An employee of a temporary help agency does not have a permanent, fixed worksite. It is therefore appropriate that the joint employment provision defines the "worksite" of a temporary employee as the temporary help office, rather than the various changing locations at which the temporary employee performs his or her work.

Harbert, 391 F.3d at 1153. The problem with the majority's pronouncement in this regard is that temporary help agencies or placement agencies often place their employees in long-term assignments. The assignment may range from a few weeks to a few months to a few years. In fact, some placements are indefinite in duration depending on the nature of the service provided and the needs of the secondary employer that is requesting employees from a placement service.

Even though Ms. Harbert's placement at Sunset Manor was not considered to be a temporary placement, her primary employer, HSG, still had the authority and the power to reassign her to another one of its client accounts. Whether HSG would have done that is a matter of speculation at this point, but it is well within the realm of real possibility that other similar businesses reassign some or all of their outstationed employees regularly enough to raise the question: do those employees have a "fixed" worksite?

Judge Kelly touched on this issue when he noted that the majority "fails to account for the many variations in joint employment relationships, from forever fixed to forever mobile." *Id.* at 1155. Congress was aware of such variations in employment relationships and thus directed the Secretary of Labor to define "worksite" in the same manner as "single site of employment" under the WARN Act. *Id.* The definition of "single site of employment" in the WARN Act regulation included employees who are "outstationed." *See* 20 C.F.R. § 639.3(i)(6). On appeal, the Secretary of Labor argued that joint employees, such as Nancy Harbert, are "outstationed" employees and thus properly treated in § 825.111(a)(3) pursuant to Congress' directive that "worksite" be defined in the same way as "single site of employment." *See Harbert*, 391 F.3d at 1152. The majority, however, simply declared that "outstationed" referred only to employees without a fixed place of work. *See id.* The majority provided three reasons for its interpretation: (1) a parenthetical in WARN Act regulation § 639.3(i)(6); (2) a reference made by the DOL to the subject WARN Act regulation in the course of promulgating the regulation; and (3) ambiguity in the definition of "single site of employment" for "outstationed" employees. *See Harbert*, 391 F.3d at 1152-53.

Judge Kelly was not persuaded. *See id.* at 1155. First, the parenthetical found in §639.3(i)(6) of the WARN Act regulation clearly follows the third category of workers in a disjunctive list. The parenthetical does not directly follow the term "outstationed" and thus does not modify that term. Therefore, at most, the parenthetical should only be interpreted to modify workers "whose primary duties involve work outside any of the employer's regular employment sites." In addition, the examples in the parenthetical are just that—examples. While "bus drivers" may arguably denote workers without a fixed employment site, there is nothing about "railroad workers" and "salespersons" to indicate that all such workers have no fixed place of work. Therefore, the definition of "single site of employment" found in WARN Act regulation § 639.3(i)(6) is certainly broad enough to include outstationed workers whose place of work is largely fixed.

Second, the majority discussed a reference made by the DOL in the Federal Register during the enactment of the WARN

Act regulations. *See Harbert*, 391 F.3d at 1152. The full text of the relevant passage was set forth in the majority's opinion. *See id.* at 1152 n. 4 (Appendix A at A-18 – A-19, n. 4). The passage discussed how to handle maintenance crews in the railroad industry who have no home base to which they are assigned. Therefore, the agency determined that there must be some central or regional office from which they receive their orders and/or assignments. The agency stated as follows:

> In order to cover this situation ***and*** the situation of ***outstationed workers*** and traveling workers who report to but do not work out of a particular office, that part of the regulation relating to mobile workers has been revised to clarify that such workers should be treated as assigned to their home base or to the single site from which their work is assigned or to which they report.

54 Fed.Reg. 16042, 16051 (1989) (emphasis added). Reading the entire passage in context and not just the reference made to "that part of the regulation relating to mobile workers," *id.*, it becomes clear that the DOL was adding additional categories of workers, including "outstationed workers" to that particular regulation. Those additional categories were in fact added to WARN Act regulation § 639.3(i)(6), and Congress, aware of the WARN Act and its regulations defining "single site of employment," directed the Secretary of Labor to implement the FMLA by defining "worksite" in the same way.

Third, the majority found ambiguity in the definition of "single site of employment" for "outstationed" workers. According to the majority, there were three different possible locations for the "single site of employment" of an outstationed employee: (1) "the single site of employment to which they are assigned as their home base," (2) the site "from which their work is assigned," or (3) the site to which they report." *See Harbert*, 391 F.3d at 1152-53. Despite acknowledging that any such

ambiguity would normally result in deference to the agency's construction and interpretation of the statute, *see id.* at 1153, the majority still invalidated the DOL's regulation as applied to Ms. Harbert. *See id.*

Contrary to the majority's rationale, the WARN Act regulation is simply not ambiguous. The three "different" locations found in § 639.3(i)(6) are simply three different ways of referring to the same conceptual place—namely, an employer's office from which assignments are made or to which the employee reports. A traveling salesperson or an employee who works from her home would typically have an office to which she is assigned which is also considered her "home base." That office would also be the site from which she is assigned or to which she reports. *See* 29 C.F.R. § 825.111(a)(2). An outstationed worker, such as a railroad maintenance crew employee, however, may not be directly assigned to an office of his employer or have an office that is considered his "home base." *See* 54 Fed. Reg. at 16051; *see also* discussion *supra* at p. 13. Therefore, the agency used additional terms to refer to the operative employer site—the site from which the employee is assigned or to which the employee reports—in the event that such office or site is not considered the employee's home base. Using Ms. Harbert as an example, HSG was her primary employer. She was assigned from HSG's regional office in Golden, Colorado, to work at Sunset Manor in Brush, Colorado. Sunset Manor was not her "home base" because Sunset Manor was not an HSG facility. In addition, even if HSG's regional office in Golden was not considered Ms. Harbert's home base, it was, nevertheless, the office from which she was assigned and to which she reported. Therefore, the DOL's rule defining "worksite" for joint employees, like Ms. Harbert, is not only an easily applied and logical rule, it also provides certainty among joint employees and their employers as to worksite when determining FMLA eligibility.

III. The majority's opinion is based on inconsistent logic and findings and promotes greater uncertainty in determining FMLA eligibility.

The parts of the WARN Act regulation the majority considers ambiguous are also the very parts that form the basis of

the DOL's regulations defining workplace for employees who work out of their homes, employees of temporary help agencies, and employees who have no fixed work place. This is significant because the majority held that the DOL's regulations defining "worksite" for those employment relationships are valid and enforceable. *See Harbert*, 391 F.3d at 1150 n. 1 ("We do not intend this statement to cast doubt on the portion of the agency's regulation defining the 'worksite' of employees whose regular workplace is his or her home."); *see id.* at 1153 ("[W]e do not question the validity of the agency's regulation pertaining to employees with 'no fixed worksite' . . . [or] . . . the validity of the joint employment provision . . . insofar as it applies to employees of temporary help agencies."). Thus, the majority's rationale is wholly inconsistent with its validation of the same regulation as applied to employees of temporary help agencies and other related regulations which are based on the same definition that the majority declared ambiguous.

The majority also focused on House and Senate Committee Reports in which employees having no fixed worksite were specifically used as an example of employment relationships in which the worksite should be the place from which work is assigned or to which the employees report. Those reports, however, did not limit the Secretary of Labor's authority to define "worksite" only for workers with no fixed place of work. Moreover, Congress specifically directed that "worksite" be defined as "single site of employment" in the WARN Act; and as discussed above and noted by the dissenting judge, WARN Act regulation § 639.3(i)(6) provides a completely reasonable basis for the DOL's regulation that defines "worksite" for all joint employment relationships—regardless of whether the worksite is "fixed" or not. *See Harbert*, 391 F.3d at 1155. Finally, the House and Senate Reports do not specifically address or use examples of employees who work out of their homes or employees of temporary help agencies; *see generally*, S.R. Doc. No. 103-3; H.R. Doc. No. 103-8(I); yet the majority considered the agency's regulations defining "worksite" permissible for those employment relationships. *See Harbert*, 391 F.3d at 1150 n. 1, 1153. Again, the majority's rationale for invalidating regulation § 825.111(a)(3) as applied to Ms. Harbert is inconsistent and fails to properly defer

to the agency's reasonable interpretation of the FMLA and Congressional directives.

Another example of the majority's inconsistent logic and rationale is its assertion that the DOL made an arbitrary distinction between sole and joint employers. Dissenting Judge Kelly was, again, not persuaded. In fact, Judge Kelly found that "this distinction favors the validity of the regulation" because "[b]asing FMLA eligibility on primary employers prevents confusion and provides certainty . . . ." *Harbert*, 391 F.3d at 1155. Furthermore, the majority compared two hypothetical employees—one, a sole employee of a convenience store chain, and the other, a joint employee employed by a placement company and assigned to work at the same convenience store—in order to show how the convenience store employee might be ineligible for FMLA leave while the placement employee might be eligible. Using this hypothetical, the majority argued that the purpose of the 50/75 provision was not achieved with respect to the joint employer. The argument, however, is overly simplified for a variety of reasons. One is that sole employment and joint employment are quite different. As the dissenting judge argued, the ability of a sole employer, such as a convenience store owner, and a joint employer, such as a placement agency, to find abundant nearby replacements is doubtfully identical. "[A]fter all, the placement agency specializes in hiring and placing employees within the area." *Id.* Joint employers are also likely to have a much larger employee base because they are not as limited by the physical constraints of an office or factory as a sole employer might be. Thus, it would likely be easier for joint employers to find a replacement for an employee on leave.

The majority also entirely failed to consider the very real fact that a joint employer is usually a sole employer as well. For example, a temporary help or placement agency has a main office where its management and administrative employees report on a regular daily basis. These employees are unquestionably solely employed by the placement agency. Its joint employees, however, comprise the pool of employees that the placement agency assigns to other businesses in off-site locations. Where a joint employer outstations some of its employees to more fixed secondary worksites, the majority's holding would potentially bestow FMLA

eligibility to the joint employer's sole employees but deny such eligibility to its joint employees. Furthermore, applying § 825.111(a)(3) to joint employees with both "fixed" and "non-fixed" worksites does not defeat the purpose or operation of the 50/75 provision. For example, a placement agency or any other joint employer with a large number of employees would still find itself exempt from FMLA leave requirements if the office from where its joint employees are assigned (to fixed or non-fixed sites), employs less than 50 employees (joint or sole) within a 75 mile radius of that office. Finally, the majority's criticism of the distinction between sole and joint employment is completely inconsistent with its dictum that the DOL's definition of "worksite" is valid for temporary help agencies, s*ee id.* at 1153, because recognizing the definition of "worksite" in § 825.111(a)(3) as applied to temporary help agencies necessarily requires that such a distinction between sole and joint employment be made.

Also, the majority's distinction between temporary help agencies and other joint employers creates an arbitrary and illogical exception for a particular subset of joint employers. A temporary help agency and a joint employer, like HSG, essentially operate identically. Both contract with other businesses to provide necessary employees. Both hire employees for the express purpose of assigning them to other businesses at off-site locations. Both are responsible for hiring, firing, paying, providing benefits, assigning, placing, and transferring their employees. The only difference between a temporary help agency and an employer like HSG is that the temporary help agency places specialized employees who can perform a specific job for a secondary contracting employer. HSG and other employers with similar business models provide an entire service (e.g., housekeeping, security, food service, etc.) and the employees to perform the service on the site of the secondary contracting business. While the employees of a temporary help agency are placed in "temporary" job assignments, those assignments may be either short- or long-term. Similarly, while the employees of joint employers like HSG may be hired for a more "permanent" position, their assignments at any particular contracting business may be either long- or short-term. Both temporary help agencies and employers like HSG have the authority to re-assign their

employees to other job locations, either at the primary employer's pleasure or at the request of the secondary contracting employer. There simply is no difference profound enough between temporary help agencies and other joint employers to justify validating §825.111(a)(3) as to one type of joint employer and not others. Furthermore, the distinction between "fixed" versus "non-fixed" worksites with respect to jointly employed employees is too murky to make that the basis for determining the regulation's applicability.[7]

The Tenth Circuit majority has invalidated, as applied, a wholly reasonable, consistent, and certain definition of "worksite" for joint employees, and this Court's review of that decision is warranted.

CONCLUSION

In this split-decision case-of-first-impression, a majority of a Tenth Circuit three-judge panel invalidated a DOL regulation defining "worksite" as the regulation applied to joint employees with largely "fixed" places of work. The majority's rationale for its decision, however, fails to show how the regulation, as applied, is an arbitrary and unreasonable interpretation of the FMLA—especially considering the authority given by Congress to the DOL to implement the statute and Congressional reports expressly directing that "worksite" be defined as "single site of employment" under the WARN Act. The WARN Act regulations defined "single site of employment" for a wide variety of employment relationships, including employees who are "outstationed." The DOL accordingly patterned its regulation defining "worksite" in the context of joint employment after the WARN Act regulation relating to outstationed employees. The majority's distinction between "fixed" and "non-fixed" worksites has no basis in the legislative history, and it creates more uncertainty as the parameters of those terms remain unclear. The DOL's regulation § 825.111(a)(3) is a reasonable and permissible interpretation of the FMLA that provides certainty and consistency in determining FMLA eligibility for all jointly employed employees.

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[7] *See supra* note 6.

Given that this question is one of first impression, that the Tenth Circuit panel was divided, that a regulation authorized by Congress has been invalidated as applied, and that the invalidation creates more uncertainty and inconsistency in the area of FMLA leave for certain types of employment relationships, the United States Supreme Court should grant certiorari to review the Tenth Circuit's decision and the merits supporting the full validation and enforceability of DOL regulation § 825.111(a)(3).

WHEREFORE, Petitioner, Nancy Harbert, respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NANCY E. HARBERT,

Plaintiff-Appellee,

v. No. 03-1156

HEALTHCARE SERVICES GROUP, INC., a Pennsylvania Corporation,

Defendant – Appellant,

ELAINE CHAO, Secretary of Labor,

Amicus Curiae.

Appeal from the United States District Court for the District of Colorado (D.C. No. 00-K-908 (MJW))

Jeffrey L. Braff, Cozen O'Connor, Philadelphia, Pennsylvania, for Defendant-Appellant.

Clifford L. Beem, Clifford Beem & Associates, P.C., Denver, Colorado (A. Mark Isley, Clifford Beem & Associates, P.C., Denver, Colorado, with him on the brief), for Plaintiff-Appellee.

Roger Wilkinson, Attorney, United States Department of Labor, Washington, DC (Howard M. Radzely, Solicitor of Labor, Steven J. Mandel, Associate Solicitor, and Anne P. Fugett, Senior Attorney, United States Department of Labor, Washington, DC, with him on the brief), for Amicus Curiae.

Before **EBEL, KELLY,** and **McCONNELL,** Circuit Judges.

EBEL, Circuit Judge.

Nancy Harbert ("Plaintiff") brought this action against her former employer, Healthcare Services Group, Inc. ("Defendant'), alleging that Defendant wrongfully denied her request for medical leave under the Family and Medical Leave Act ("FMLA"). Defendant had denied her request based on a provision of the FMLA which excludes from FMLA eligibility any employee who is employed at a particular "worksite" if the employer employs less than 50 employees within 75 miles of that worksite.

Applying a Department of Labor ("DOL") regulation, the district court defined Plaintiff's "worksite" as Defendant's regional office in Golden, Colorado. Because Defendant employed more than 50 employees within 75 miles of its Golden office, the district court denied Defendant's motion for summary judgment and, after a bench trial, found in Plaintiff's favor. Defendant filed this appeal, arguing that the relevant portion of the DOL regulation defining the statutory term "worksite" is invalid. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

BACKGROUND

Defendant contracts out housekeeping and laundry services to long-term care institutions. Defendant employs approximately 17,000 employees and has contracts with about 1,300 long-term care facilities in 42 states. Organizationally, Defendant is divided into regions, which are composed of multiple

districts. Each district is made up of individual accounts, which are the long-term care institutions. Account managers work at the account to which they are assigned and report to district managers. District managers report to regional managers. In Colorado, all district managers and the regional manager have their offices at the same location in Golden, Colorado.

Sunset Manor is a convalescent/nursing facility located in Brush, Colorado, which is more than 75 miles from Golden. In 1994, Plaintiff was hired by Sunset Manor as the Housekeeper Supervisor, and in 1995 her responsibilities were expanded to include the position of Laundry Department Supervisor. In 1997, Defendant entered into an agreement to provide housekeeping and laundry services to Sunset Manor. Plaintiff's employment with Sunset Manor was transferred to Defendant, and Plaintiff became the account manager for Defendant's Sunset Manor account. Defendant assumed all responsibility for retaining, transferring, or firing Plaintiff and also paid her salary and provided her benefits. Plaintiff's duties, however, remained essentially the same as when she was employed directly by Sunset Manor.

Plaintiff worked out of an office at Sunset Manor in Brush. When Plaintiff reported to her district manager, she reported to him at Defendant's regional office in Golden. Such reports were almost always by telephone or through the submission of written reports; Plaintiff went to the Golden office only for an occasional district meeting of account managers. Sunset Manor's administrator exercised supervision and control over Plaintiff when Plaintiff was employed by Sunset Manor, and this did not change after Plaintiff became an employee of Defendant. Plaintiff believed that she had a long-term job at Sunset Manor and planned to work there until her retirement at age 65.

On November 6, 1998, Plaintiff injured her right hip in a non-work related automobile accident. Plaintiff got permission from Defendant to take two 30-day periods of leave, and Plaintiff began the first 30-day period of leave on December 8, 1998. On February 20, when Plaintiff failed to report to work after the expiration of the second 30-day period of leave, Defendant terminated Plaintiff's employment.

Although Defendant had granted Plaintiff two 30-day periods of leave, Defendant denied Plaintiff's request for leave under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* The FMLA requires covered employers to provide eligible employees with up to 12 weeks of medical eave per year for, inter alia, a serious health condition that renders the employee unable to work. Id. § 2612(a)(1)(D). Only those employees whose employer employs at least 50 employees within 75 miles of that employee's "worksite" are eligible for leave under the Act. Id. § 2611(2)(B)(ii). The statutory term "worksite" is defined in a DOL regulation. See 29 C.F.R. § 825.111(a)(3).

Defendant denied Plaintiff's request for FMLA leave based on Defendant's conclusion that Plaintiff was not employed at a "worksite" at which Defendant employed 50 or more employees within 75 miles, and that she was therefore ineligible for FMLA leave. This conclusion was based on the premise that Plaintiff's "worksite" was Sunset Manor in Brush, rather than Defendant's regional office in Golden. During the relevant time period, Defendant employed fewer than 50 employees within 75 miles of Sunset Manor but employed more than 50 employees within 75 miles of its regional office in Golden.

Plaintiff filed this lawsuit, alleging that Defendant wrongfully denied her request for medical leave under the FMLA and wrongfully terminated her. Defendant moved for summary judgment in part on the ground that the relevant portion of the DOL regulation defining the statutory term "worksite" was invalid. See Harbert v. Healthcare Servs. Group, Inc., 173 F.Supp.2d 1101, 1006 (D.Colo. 2001). The district court upheld the regulation and denied Defendant's motion for summary judgment. See id.

After a bench trial, the district court concluded that Plaintiff's "worksite" under the applicable regulation was Defendant's regional office in Golden, Colorado. Because Defendant employed more than 50 employees within 75 miles of its Golden office, the court held that Defendant wrongfully denied Plaintiff benefits under the FMLA. The district court awarded

Plaintiff back pay, front pay, liquidated damages, interest, costs, and attorneys fees.

In this appeal, Defendant concedes that the applicable DOL regulation identifies Plaintiff's "worksite" as its regional office in Golden. Defendant argues only that this regulation is invalid, contending that the agency exceeded its authority to implement the FMLA.

DISCUSSION

I. Appellate Jurisdiction

We first address whether we have jurisdiction to consider the merits of this appeal. On March 13, 2003, the district court entered an order resolving the issue of liability in Plaintiff's favor and setting forth a formula for the calculation of damages. The court instructed the parties to meet to determine the precise amount of damages and prepare a judgment in accordance with that determination. Defendant filed a notice of appeal on April 11. The district court later entered judgment, fixing damages in the amount agreed upon by the parties and disposing of the case. No new notice of appeal was taken from the subsequent judgment. Defendant now wishes to appeal only the issue of liability resolved in the March 13 decision, not the subsequent calculation of damages.

Under 28 U.S.C. § 1291, we have jurisdiction only over "final" decisions of the district court. Albright v. UNUM Life Ins. Co. of Am., 59 F.3d 1089, 1092 (10th Cir. 1995). Accordingly, we must determine whether the March 13 Order – the only order from which a notice of appeal was taken – was a final decision and, if not, whether it became final when the district court subsequently fixed damages and disposed of the case.

A. Whether the March 13 Order was a "final" decision

For a ruling to be final, "it must end the litigation on the merits, and the judge must clearly declare his intention in this respect." FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.,

498 U.S. 269, 273-74 (1991) (internal quotations and citations omitted). A final order is one that "leave[s] nothing for the court to do but execute the judgment." Albright, 59 F.2d at 1092 (internal quotations omitted). As a general rule, "the touchstone of a final order is a decision by the court that a party shall recover only a *sum certain*." Id. (citing Fed. R. Civ. P. 58) (internal quotations omitted) (emphasis in original). Accordingly, an order that determines liability but leaves damages to be calculated is not final. Id. However, pursuant to an exception to the general rule, "an order is final even if it does not reduce the damages to a sum certain if the order sufficiently disposes of the factual and legal issues and any unresolved issues are sufficiently ministerial that there would be no likelihood of further appeal." Id. At 1093 (quotations omitted).

For example, in Albright v. UNUM Life Insurance Co. of America, the plaintiff had requested in his motion for summary judgment the "monthly benefit of 66 2/3 % of his preinjury basic monthly earnings less other income benefits such as workers' compensation and Social Security Disability." Id. At 1092 (quotation omitted). The district court granted his motion but did not address the issue of benefits. Id. We stated that "both determining the correct amount of monthly benefits and the proper deductions for other income benefits may prove to be complicated and disputed calculations" and were not likely to be simply ministerial. Id. at 1093. Accordingly, we held that the district court's order was not final, and we dismissed the defendant's appeal. Id. at 1094.

In this case, the district court awarded Plaintiff back pay, front pay, liquidated damages, interest, costs, and attorneys fees. Specifically, the district court set total back pay in the amount of $84,778.80, to be reduced by "the amount [Plaintiff] has earned [since her termination] through other employment together with interest on the net amount at the legal rate." The district court set total front pay in the amount of $102,374.40, to be reduced by "the amount of compensation [Plaintiff] would earn from Conoco [until her 65th birthday], calculated at her present rate of earnings per week plus any guaranteed raises or cost of living increases."

The district court then ordered the parties "to meet and confer within [] 20 days from the date hereof to determine the precise amounts to be set forth in the judgment in accordance with the above stated findings and conclusions." The district further directed, "If counsel can agree, they shall prepare a judgment in accordance herewith. If counsel are unable to agree, they shall notify the court within the following ten days and the matters not agreed upon will be set for hearing."

The various components of the damages award were not sufficiently fixed to satisfy the standard we set forth in Albright. The amount of Plaintiff's past and future earnings was not determined, and calculation of those amounts could have proven complicated and disputed. For example, nothing in the order indicates whether Plaintiff's weekly compensation at Conoco is fixed or varies, and nothing in the order defines a "guaranteed" raise or cost of living increase. As such, the process of calculating damages in this case was no more "ministerial" than it was in Albright itself.

Moreover, the district court must have contemplated the possibility of a contentious process because it provided in its order that if the parties could not agree on the amount of the award, the disputed issues would be set for hearing. By so providing, the district court did not "clearly declare[e] his intention" to "end the litigation on the merits" in the March 13 Order. FirsTier, 498 U.S. at 273-74. For these reasons, we hold that the court's March 13 decision was not a final decision.

B. Whether the March 13 Order became "final" when the district court disposed of the remainder of the case.

In Lewis v. B.F. Goodrich Co., we held that an otherwise nonfinal decision becomes final and appealable if the district court adjudicates all remaining claims against all remaining parties before the appellate court acts to dismiss the appeal on the merits for lack of jurisdiction. 850 F.2d 641, 645 (10th Cir. 1988) (en banc); see also Old Republic Ins. Co. v. Durango Air Serv., Inc., 283 F.3d 1222, 1225 (10th Cir. 2002); Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am., 935 F.2d 1152, 1154 n.1 (10th Cir. 1991); Fed. Sav. & Loan Ins. Corp. v. Huff, 851 F.2d 316, 317-18 (10th

Cir. 1988) (en banc); Moore's Federal Practice, § 54.25[3], at 54-87 ("If an order is not certified under Rule 54(b), but a notice of appeal is nevertheless filed, any subsequent order of the district court that completely adjudicates the remaining claims is sufficient to validate the otherwise premature notice of appeal."). Accordingly, a decision that is otherwise nonfinal because it leaves damages unresolved becomes final and appealable if post-appeal adjudications in the district court precisely fix damages and dispose of the case. Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 311 n.3 (3rd Cir. 2001).

Here, subsequent to the notice of appeal, the district court entered a judgment fixing damages. All claims against all parties are now resolved. The district court's nonfinal decision therefore became final as a result of the post-appeal proceedings in the district court. We hold that the notice of appeal filed in this case was effective to confer appellate jurisdiction over the district court's March 13 Order. See Lewis, 850 F.2d at 645; Gen. Motors Corp., 263 F.3d at 311 n.3.

II. MERITS

Defendant challenges only the validity of 29 C.F.R. § 825.111(a)(3), the Department of Labor regulation defining the "worksite" of jointly-employed employees. Both parties agree that this joint employment provision, if valid, governs this case and that it would lead to a conclusion that Plaintiff was a covered employee. We review a district court's decision regarding the validity of an agency regulation *de novo*. See Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1293 (10th Cir. 1999).

The framework we use to analyze an agency's construction of a statute it administers was set forth by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984). Chevron mandates a two-step inquiry. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. Because the judiciary is the final authority on issues of statutory

construction, it "must reject administrative constructions which are contrary to clear congressional intent." Id. at 843 n.9. To ascertain whether Congress had an intent on the precise question at issue, courts should "employ[] traditional tools of statutory construction." Id. These tools include examination of the statute's text, structure, purpose, history, and relationship to other statutes. See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 124 S.Ct. 1236, 1248-49 (2004).

Second,

> [i]f...the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 843 (footnote omitted). The Court explained that an agency's answer is permissible unless arbitrary, capricious, or manifestly contrary to the statute:

> The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly

> contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (internal quotations and citations omitted) (footnotes omitted).

A. The Family and Medical Leave Act ("FMLA")

The FMLA was enacted, in part, "to balance the demands of the workplace with the needs of families...[and] to entitle employees to take reasonable leave for medical reasons...in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). The Act entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year because of, among other things, "a serious health condition that makes the employee unable to perform the functions of the position of such employee." Id. § 2612(a)(1)(D).

As part of the balance that was struck between the interests of employers and the interests of employees, Congress included a small employer exception that excludes from the Act's coverage employers with fewer than 50 employees. Id. § 2611(4)(A)(i). A separate exception was granted for small operations – that is, a potentially large company with a relatively small satellite office in a particular area. Specifically, the statute excludes from coverage any employee whose employer employs less than 50 employees within 75 miles of that employee's "worksite" ("the 50/75 provision"). Id. § 2611(2)(B)(ii). According to the House Committee Report, the 50/75 provision "recognizes the difficulties an employer may have in reassigning workers to geographically separate facilities." H.R. Rep. No. 102-135(I), at 37 (1991).

With these eligibility restrictions, Congress recognized that only about 40 to 50 percent of all employees would be

covered by the Act. S. Rep. No. 102-68, at 24 (1991); H.R. Rep. No. 102-135(I), at 37 (1991).

B. The FMLA regulation defining "worksite"

Congress granted the Secretary of Labor the authority to prescribe such regulations as are necessary to carry out the FMLA. 29 U.S.C. § 2654. The regulation at issue in this case, 29 C.F.R. § 825.111(a)(3), defines the "worksite" of an employee who is jointly employed by two or more employers as follows:

> For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (see § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

Id. § 825.111(a)(3). Section 825.106(a) states that two entities may be considered "joint employers" where they both exercise some control over the work or working conditions of the employee. Id. § 825.106(a). For example, joint employment will ordinarily be found to exist when a temporary agency supplies employees to a second employer. Id. § 825.106(b). In joint employment relationships, the "primary employer" is the only employer responsible for providing FMLA leave. Id. § 825.106(c). The "primary employer" is determined by considering such factors as the authority to hire and fire, assign/place the employee, make payroll, and provide employment benefits. Id.

In this case, the district court identified Plaintiff as jointly employed by both Defendant and Sunset Manor, applied § 825.111(a)(3), and defined Defendant as Plaintiff's "primary employer." None of this is at issue in this appeal. What is at issue is whether § 825.111(a)(3) is a valid regulation implementing the FMLA.

C. The Chevron analysis

Pursuant to Chevron's mandate, we must first consider whether Congress expressed a clear intent with respect to the meaning of "worksite" for an employee who is jointly employed. See 467 U.S. at 842-43. We conclude that congressional intent with respect to this issue is not sufficiently clear to render the regulation invalid under the first step of Chevron.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979); CBC, Inc. v. Bd. Of Governors of the Fed. Reserve Sys., 855 F.2d 688 690 (10th Cir. 1988). Congress did not define the term "worksite" in the FMLA. However, the common understanding of the term "worksite" is the site where the employee works. Here, the parties do not dispute that Plaintiff worked at Sunset Manor in Brush, Colorado. Under the ordinary meaning of the term, her "worksite" would be Sunset Manor in Brush. However, under the joint employment regulation, § 825.111(a)(3), Plaintiff's "worksite" is Defendant's regional office in Golden, a place where Plaintiff went only for occasional meetings or account managers. Nonetheless, Congress did not expressly define the term "worksite" in the FMLA, and because Congress has not directly spoken to the question at issue, we proceed to a step-two analysis under Chevron.

Under the second step of Chevron, we must "give[] controlling weight [to the agency's regulations] unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844. In light of the deference we owe an agency's construction of the statute, this case presents a very close question. However, we conclude that § 825.111(a)(3), as applied to the situation of an employee with a fixed place of work, is arbitrary, capricious, and manifestly contrary to the FMLA. We first address the three indicia of congressional intent that lead us to this conclusion, and then consider the counter-arguments made by Plaintiff and the Secretary of Labor.

1. Common meaning of the term "worksite"

We concluded above that the agency's definition of "worksite," as applied to Plaintiff, runs contrary to the common meaning of that term. See discussion supra. That the agency's definition of Plaintiff's worksite contravenes the plain meaning of the term "worksite" is one indicia of congressional intent that militates against deference to the agency's construction of the statute under the second step of Chevron.

2. Legislative Purpose

"Courts must guard against interpretations that might defeat a statute's purpose[.]" United States v. Soto-Ornelas, 312 F.3d 1167, 1172 (10th Cir. 2002) (quotations and alterations omitted). The agency's definition of worksite, as applied to Plaintiff, is contrary to the purpose underlying the 50/75 provision.

As discussed above, Congress included a provision in the FMLA excluding from the Act's coverage employers with fewer than 50 employees. 29 U.S.C. § 2611(4)(A)(i). However, Congress also recognized that even potentially large employers (i.e., those with more than 50 employees) may have difficulty finding temporary replacements for employees who work at geographically scattered locations. Congress therefore determined that if any employer (large or small) has no significant pool of employees *nearby* to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee. Specifically, Congress determined that an employer must employ at least 50 employees *within 75 miles* of the employee's worksite. Id. § 2611(2)(B)(ii).

The House Report confirms that the congressional purpose underlying the 50/75 provision was to remove the burden of providing FMLA leave from employers who do not have an abundant supply of temporary replacements in close geographic proximity to the employee requesting leave:

> For purposes of determining the size of an employer, there is a geographic limitation of a 75-mile radius that applies to the aggregation of employees

> at different facilities. This provision recognizes the difficulties an employer may have in reassigning workers to geographically separate facilities.

H.R. Rep. No. 102-135(I), at 37 (1991).

An employer's ability to replace a particular employee during his or her period of leave will depend on where that employee must perform his or her work. In general, therefore, the congressional purpose underlying the 50/75 provision is not effected if the "worksite" of an employee who has a regular place of work is defined as any site other than that place.[1]

For example, if Defendant were to grant leave to Plaintiff, Defendant would have been required to find an employee to cover for Plaintiff at Sunset Manor in Brush, Colorado. It is undisputed that Defendant employed fewer than 50 employees within 75 miles of Brush. Defendant therefore had no abundant supply of employees who could have covered for Plaintiff during her period of leave. Defendant, a large employer with geographically dispersed employees, is precisely the type of employer Congress intended to protect with its enactment of the 50/75 provision.

Accordingly, a regulatory provision that defines Plaintiff's "worksite" as Defendant's regional office in Golden does not effect the congressional purpose underlying the 50/75 provision.

3. Arbitrary distinction between sole and joint employers

The challenged regulation also creates an arbitrary distinction between sole employers and joint employers. For example, if the employer is a company that operates a chain of convenience stores, the "worksite" of an employee hired to work at one of those convenience stores is that particular convenience store. See 58 Fed. Reg. 31794, 31798 (1993). If, on the other

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[1] We do not intend this statement to cast doubt on the portion of the agency's regulation defining the "worksite" of employees whose regular workplace is his or her home. See 29 C.F.R. § 825.111(a)(2).

hand, the employer is a placement company that hires certain specialized employees to work at convenience stores owned by another entity (and therefore is considered a joint employer), the "worksite" of that same employee hired to work at that same convenience store is the office of the placement company. See 29 C.F.R. § 825.111(1)(3).

Assuming both employers employ more than 50 employees within 75 miles of their central office but fewer than 50 employees within 75 miles of the convenience store, the employee is *ineligible* for FMLA leave if the employer is a sole employer (e.g., the company that owns the convenience store chain) but *eligible* for FMLA leave if the employer is a joint employer (e.g., the placement company).

Accordingly, the joint employment provision creates the possibility that an employer's responsibility to provide FMLA leave to an employee will depend *exclusively* on whether that employer is a sole employer or a joint employer. This is true despite the fact that neither employer has an abundant supply of nearby employees to replace temporarily an employee taking leave and, consequently, are both subject to the burden Congress tried to alleviate by enacting the 50/75 provision. See discussion supra Section II.C.2. The effect of the joint employment provision is to require the joint employer to bear that burden even though the sole employer is relieved of that burden. Because both types of employ8ers bear the burden the 50/75 provision was designed to alleviate, there is simply no basis in the statute or in logic for such a distinction.[2] We owe no deference to an agency's arbitrary construction of a statute. See Chevron, 467 U.S. at 844.

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[2] The Secretary insists that the distinction between sole employers and joint employers is not arbitrary because the agency could reasonably have concluded that joint employers are better equipped to find replacements for remotely-stationed employees. We disagree. While some joint employers may have employees who are willing to change job locations regularly (e.g., temporary employees), there is not reason to believe that these employees are any more likely than any other employee to do so if changing job locations requires moving to a new location more than 75 miles away.

In sum, the ordinary meaning of the term "worksite," the congressional purpose underlying the 50/75 provision, and the arbitrary distinction the regulation creates between sole and joint employers all militate strongly against deference to the agency's construction of the statute as applied to Plaintiff. At bottom, Congress intended the term "worksite" to be construed as the employee's regular place of work, and we see no reason to apply a different definition to Plaintiff simply because she is jointly-employed. We turn next to the counter-arguments offered by the Secretary and Plaintiff.

4. Counter-arguments

a. The legislative history's reference to the WARN Act

The Secretary insists that the joint employment provision is valid because the agency, as directed by the legislative history, patterned the definition of "worksite" after the definition of "single site of employment" in the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 *et seq.*

The Secretary correctly points out that the House and Senate Committee Reports both indicate that the term "worksite" is to be construed consistent with the term "single site of employment" under the WARN Act and regulations under that Act:

> The term "worksite" intended to be construed in the same manner as the term "single site of employment" under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. 2101(a)(3)(B), and regulations under that Act (20 CFR Part 639). Where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salespersons, such employee's "worksite" should be construed to mean the single site of employment to which

> they are assigned as their home base, from which their work is assigned, or to which they report.

S. Rep. No. 103-3, at 23 (1993); see also H.R. Rep. No. 103-8(I), at 35 (1993) (substantially the same).

The WARN Act requires covered employers to provide written notice to affected employees sixty days before a "mass layoff." 29 U.S.C. § 2102(a); see also Frymire v. Ampex Corp., 61 F.2d 757, 761 (10th Cir. 1995). Congress defined "mass layoff" as "a reduction in force which...results in an employment loss at the *single site of employment* during any 30-day period for...at least 50 employee[.]" 29 U.S.C. § 2101(a)(3) (emphasis added). The WARN Act itself does not define "single site of employment."

The Secretary of Labor has promulgated a regulation defining the term "single site of employment" for purposes of the WARN Act.[3] 20 C.F.R. § 639.3(i); see also 29 U.S.C. § 2107. The focus of the regulation is in explaining when two or more different employment sites can be counted together as a "single site" for the purpose of aggregating employees to reach the 50-employee minimum. See 20 C.F.R. § 639.3(i). The regulation also recognizes that the employment sites of certain groups of employees will be difficult to identify. Accordingly, it provides:

> For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they

[3] This regulation was promulgated in 1989 (see 54 Fed. Reg. 16042 (1989)), prior to enactment of the FMLA.

> report will be the single site in which they are covered for WARN purposes.

Id. § 639.3(i)(6).

The Secretary argues that its FMLA joint employment regulation, 29 C.F.R. § 825.111(a)(3), is consistent with this WARN regulation defining "single site of employment" for purposes of the WARN Act. Specifically, the Secretary argues that jointly-employed employees are essentially "outstationed" workers and are properly treated in the joint employment provision of the FMLA in the same manner that outstationed workers are treated under this WARN Act regulation. For several reasons, we disagree.

First, we believe that this provision of the WARN Act governs only employees without a fixed place of work, not employees who, like Plaintiff, do have a fixed place of work. All three examples listed in the parenthetical in the WARN Act regulation are employees who do not have a fixed place of work. See 20 C.F.R. 639.3(i)(6) (listing railroad workers, bus drivers, and salespersons). Furthermore, the agency, in enacting the WARN Act regulation, referred to § 639.3(i)(6) as "that part of the regulation relating to mobile workers[.]" 54 Fed. Reg. 16042, 16051 (1989).[4] Finally, for employees who do not have a fixed

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[4] The passage provides in full:

> Another commenter suggested that in the railroad industry certain maintenance crews have no home base and should be treated as separate operating units. While such workers may well be considered as a separate operating unit, their status must be determined in terms of the single site of employment to which they are assigned. These workers may not have an assigned home base, but they must get their orders or assignments from somewhere, even if that place changes from time to time. In order to cover this situation and the situation of outstationed workers and traveling workers who report to but do not work out of a particular office, that part of the regulation relating to *mobile workers* has been revised to clarify that such workers should be treated as assigned to their home base or to the single site from which their work is assigned or

(cont'd)

place of work, there is no reason to believe the agency for purposes of the WARN Act would have named any different place as the employee's employment site. Accordingly, we conclude that the applicable WARN Act regulation, 20 C.F.R. § 639.3(i)(6), applies only to employees without a fixed place of work and is not relevant to employees who, like Plaintiff, do have a fixed place of work.

Further, even if the term "outstationed" in the WARN Act regulation could reasonably be interpreted more broadly to encompass employees who do have a fixed place of work, the definition of "single site of employment" for outstationed employees under the WARN Act is ambiguous. Under the WARN Act regulation, there are three potentially different locations that could be the "single site of employment" of an outstationed employee – namely, "the "site...to which they are assigned as their home base, from which their work is assigned, or to which they report." 20 C.F.R. § 639.3(i)(6). Accordingly, even if Plaintiff, who does have a fixed place of work, could be considered "outstationed" under the WARN Act regulation, it is entirely unclear from the regulation whether her "single site of employment" would be Brush (the site to which she is assigned) or Golden (the place to which she reports and from which she is assigned). As such, the WARN Act regulation provides little, if any, guidance to the agency with respect to the proper definition of "worksite" for an employee who, although arguably "outstationed," does have a fixed place of work.

Absent guidance from Congress, such ambiguity might militate in favor of deference to the agency's construction of the statute. As discussed above, however, the plain meaning of the term "worksite" in the FMLA, the congressional purpose underlying the 50/75 provision in the FMLA, and the arbitrary distinction the regulation creates between sole and joint employers

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(cont'd)
to which they report. This part of the definition has been moved, for reasons of organizational clarity, to be a part of the definition of "single site of employment" in § 639.3(i).

54 Fed. Reg. at 16051 (emphasis added).

under the FMLA are all factors that militate strongly against deference to the agency's construction of that statute. We therefore find no merit in the Secretary's argument that an ambiguous regulation implementing the WARN Act renders the agency's construction of the FMLA reasonable.

b. Congressional recognition that the "worksite" of some employees may not be their regular workplace

The Secretary also argues that because the legislative history suggests that the "worksite" of some employees may be some place other than their regular place of work, it was permissible for the agency to define the "worksite" of jointly-employed employees as some other location. We disagree.

The House and Senate Committee Reports both provide a definition of "worksite" for employees with "no fixed worksite." Specifically:

> Where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salespersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report.

S. Rep. No. 103-3, at 23 (1993); see also H.R. Rep. No. 103-8(I), at 35 (1993) (substantially the same). As such, both Committee Reports recognized that all employees, even those without a fixed worksite, must have a definable "worksite" so that their eligibility under the Act can be determined. For employees without a fixed worksite, it was necessary to identify some fixed location that could serve as a "worksite" for purposes of the Act. See, e.g., S. Rep. No. 103-3, at 23. That location could not be the employee's regular workplace, because the employee has no regular workplace. Accordingly, we do not question the validity of the

agency's regulation pertaining to employees with "no fixed worksite." See 29 C.F.R. § 825.111(a)(2).

Furthermore, we do not question the validity of the joint employment provision, id. § 825.111(a)(3), insofar as it applies to employees of temporary help agencies. An employee of a temporary help agency does not have a permanent, fixed worksite. It is therefore appropriate that the joint employment provision defines the "worksite" of a temporary employee as the temporary help office, rather than the various changing locations at which the temporary employee performs his or her work. See 60 Fed. Reg. 2180, 2187 (1995) (explaining that under joint employment provision, "worksite" of temporary employee is temporary help office).

On the contrary, if an employee *does* have a fixed worksite, there is no similar need to identify a constructive "worksite" for purposes of the FMLA. The Secretary's argument that an employee with a fixed worksite should be treated comparably to an employee without a fixed worksite is therefore without merit.

In sum, we find the counter-arguments offered by Plaintiff and the Secretary unavailing, and we conclude that 29 C.F.R. § 825.111(a)(3), as applied to an employee like Plaintiff with a fixed worksite yet subject to joint employers, is arbitrary, capricious, and manifestly contrary to the FMLA.[5]

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[5] We also note that we find no merit in Plaintiff's argument that congressional silence since the Secretary promulgated the regulation militates in favor of the regulation's validity. Plaintiff relies primarily on Walker v. United Parcel Service, Inc., 240 F.3d 1268 (10th Cir. 2001). In Walker, Congress had amended Title VII without taking issue with the agency regulation in question, even though the validity of the regulation had been the subject of debate within the courts. Id. at 1276. We held that congressional silence under these circumstances lent support to a conclusion that the regulation is valid, emphasizing that "[p]lainly EEOC's regulation has not escaped public or legislative notice over what has been nearly a quarter century." Id. Here, the subject regulation had not been the subject of debate until this case.

CONCLUSION

We appreciate the deference we owe to an agency's construction of the statute it is charged with administering when the agency's construction is not contrary to the clearly expressed intent of Congress. As the Supreme Court recently recognized, however, "[o]ur deference to the Secretary...has important limits: A regulation cannot stand if it is arbitrary, capricious, or manifestly contrary to the statute." Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 87 (2002) (quotation omitted) (invalidating different FMLA Regulation under second step of Chevron). We hold the 29 C.F.R. § 825.111(a)(3), as applied in this case to a jointly employed employee with a fixed worksite, is not a valid exercise of agency authority, and we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

03-1156, Nancy E. Harbert v. Healthcare Services, Inc.
KELLY, Circuit Judge, concurring in part and dissenting in part.

While I concur in the court's conclusion that we have appellate jurisdiction, I dissent from its holding that 29 C.F.R. § 825.111(a)(3) defining the statutory term "worksite" is invalid, as applied to a jointly employed employee with a largely fixed worksite. Declaring invalid a regulation that an agency has been charged with developing is strong medicine and only appropriate when the regulation is "arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984). Here, the statute never defines "worksite" and the Secretary of Labor is empowered to prescribe rules to implement the FMLA. 29 U.S.C. § 2654. We must defer to the agency's interpretation if it "is based on a permissible construction of the statute." Chevron, 467 U.S. at 843.

The court invalidates the regulation as applied to jointly employed employees with largely fixed worksites as inconsistent with the purpose of the 50/75 provision. Healthcare does not appeal the district court's decision that Ms. Harbert was jointly employed, but instead contends that the "worksite" definition is invalid. Aplt. Br. at 9-10. The 50/75 provision excludes an employee from FMLA coverage if the employee "is employed at a worksite at which [the] employer employs less than 50 employees if the total number of employees employed by the employer within 75 miles of that worksite is less than 50." 29 U.S.C. § 2611(2)(B)(ii).

Joint employment comes in many forms. But the primary employer generally has control over the reassignment, placement, and hiring and firing of joint employees, not the secondary employer. See 29 C.F.R. § 825.106(c). Thus, an employee's "worksite" is defined with reference to the employer retaining the most control over the employee, and the employer responsible for providing FMLA leave. Id. The court's ipse dixit that the Secretary's definition of the term "worksite" is contrary to common meaning fails to account for the many variations in joint employment relationships, from forever fixed to forever mobile. See Moreau v. Air Fr., 356 F.2d 942, 946 (9th Cir. 2004); 29 C.F.R. 825.106.

The legislative history reflects that the Senate and House obviously were aware of variations in joint employment relationships and directed the Secretary to construe "worksite" in the same manner as the term "single site of employment" under the WARN Act. S.R. Doc. No. 103-3, at 25 (1993); see also H.R. Doc. No. 103-8, pt. 1, at 35 (1993). Though both the legislative history and a WARN Act regulation, 20 C.F.R. § 639.3(i), discuss workers that lack a fixed site of employment, the Secretary's interpretation that other arrangements are encompassed within the directive to the WARN Act is a permissible and reasonable interpretation. Holding that the WARN Act regulation only applies to employees without a regularly fixed site of employment would seem to contravene the express language of the provision which mentions other categories, including employees who "travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment site." Id.

The court's contrast between sole and joint employers (a convenience store chain and a temporary placement agency) as an example resulting arbitrary differences in treatment is hardly persuasive. Ct. Op. at 20; but see id. at 28. The court contends that these two employers would be treated differently even though neither has abundant replacements nearby. Unlike the court, I find this distinction favors the validity of the regulation. Basing FMLA eligibility on primary employers prevents confusion and provides certainty, because a temporary placement employee's coverage could vary daily were he placed in different convenience stores on a rotating basis. Further, contrary to the court's assertion, the ability of a convenience store and a placement agency to find abundant nearby replacements probably is not identical, after all, the placement agency specializes in hiring and placing employees within the area.

Though the regulation might be more precise were we crafting it, that is not our function. It is a permissible exercise of agency rulemaking. I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-K-908

NANCY E. HARBERT,

Plaintiff,

v.

HEALTHCARE SERVICES GROUP, INC.,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

KANE, J.

This is an action brought pursuant to the Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.* Jurisdiction is uncontested and exists pursuant to 28 U.S.C. Section 1331 and 29 U.S.C. §2617 (a)(2). Trial to the court was held on October 16 and 17, 2002. At the request of the parties, post-trial briefs and proposed findings of fact and conclusions of law were tendered. The following constitutes my findings of fact, conclusions of law and order for entry of judgment. I am guided in my conclusions regarding joint employment by my previous written decision in this case, published as *Harbert v. Healthcare Servs. Group, Inc.*, 173 F. Supp.2d 1101 (D. Colo. 2001), and related bench rulings denying Defendants' Motion for Reconsideration.

Nancy E. Harbert, an employee of Healthcare Services Group, Inc. ("Healthcare"), was born on February 12, 1943. Mrs. Harbert was denied medical leave under the FMLA on the

assertion that she was not eligible. I denied a motion for summary judgment on this issue because of factual disputes.

Under the FMLA only "eligible employees" are entitled to the benefits of the FMLA. One of the eligibility requirements is that an individual be employed at a worksite at which the employer keeps at least 50 employees within a radius of 75 miles. Mrs. Harbert worked at the Sunset manor convalescent and nursing facility at Brush, Colorado. She admits that Healthcare did not employ 50 or more employees within the required radius. Eligibility, however, is based on her assertions that under the regulations issued by the United States Department of Labor, she was jointly employed by both Healthcare and Sunset Manor; that Healthcare was her primary employer; and her official "worksite" per the regulation was Healthcare's Regional Office located in Golden, Colorado. It is undisputed that Healthcare employs more than 50 people within a 75 mile radius of its Golden office. Therefore, if the regulation applies and if Mrs. Harbert was jointly employed as stated, she was indeed eligible for the FMLA leave requested by her and denied by Healthcare.

The regulations of the United States Department of Labor provide that when an employee performs work which simultaneously benefits two or more employers, a joint employment relationship will be considered to exist in such situations as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where on employer acts directly or indirectly in the interest of the other employer in relations to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

The third regulatory provision is not germane to this case. Healthcare, moreover, maintains none is germane because Mrs.

Harbert was incapable of returning to work by the expiration of the twelve weeks permitted under the FMLA in any event. Mrs. Harbert contends she was indeed eligible because Healthcare and Sunset Manor shared control of her employment, both directly and indirectly, and she was under their common control and she was able to return to work. She also notes she was terminated before the twelve week FMLA leave period ran, rendering Healthcare's assertion that she was incapable of returning to work at the end of that period speculative and unpersuasive.

Commendably, the parties made 42 stipulations which are set forth in the pre-trial order dated August 5, 2002 and are incorporated herein by this reference. As succinctly as possible, the following chronology sets forth the essential facts of Mrs. Harbert's employment.

On November 4, 1994, Mrs. Harbert was employed by Sunset Manor as the Housekeeper Supervisor. In January 1995, her responsibilities were increased to include the position of Laundry Department Supervisor. On November 25, 1997, Sunset Manor entered into a service agreement with Healthcare by which the latter would provide housekeeping and laundry services to the former. In the transition, Mrs. Harbert's employment with Sunset Manor was transferred to Healthcare. Her duties remained essentially the same, but she was required to report to a district manager at Healthcare's regional office in Golden, Colorado.

In addition to managerial and supervisory responsibilities, Mrs. Harbert performed many of the physical tasks involved in both housekeeping and laundry. She operated a number of heavy machines and worked an average of 50-55 hours per week, Monday through Friday. She was paid on the basis of a 40 hour week and did not receive overtime pay.

On November 6, 1998, Mrs. Harbert was involved in a non-work related automobile accident and suffered an injury to her hip. She attempted to return to work on November 16, 1998, but was unable to do so because of intense pain. On November 23, 1998 she called her district manager at Healthcare and asked for permission to take immediate leave of absence. The district manager deferred, promising to look into the situation.

On November 30, Mrs. Harbert's physician, Dr. Clise, examined her and gave her a note stating that because of her injury she should not stand for more that two hours per day. Mrs. Harbert called her district manager and advised him of the restriction and asked about her earlier request for leave. The district manager advised that as soon as she arranged for someone to replace her, she could go on leave. On December 7, Dr. Cline executed Healthcare's form for certification pursuant to the FMLA and Mrs. Harbert gave training instructions to a replacement she had found. The next day she began a 30-day medical leave.

On January 7, 1999, Healthcare received Mrs. Harbert's request for leave pursuant to the FMLA and on January 14 she received a response advising her that she did not qualify for FMLA, but granting her an additional 30-day leave. On February 10, 1999 Dr. Cline released Mrs. Harbert to work half-time and on February 20, Healthcare terminated Mrs. Harbert for failing to comply with the requirements of her 30-day leave. On March 9, 1999 Dr. Cline gave Mrs. Harbert a note stating she could return to full-time work without restriction. Having received her termination letter of February 20, Mrs. Harbert did not deliver or advise Healthcare of the note from Dr. Cline or her ability to return to work without restriction.

At the time of her termination, Mrs. Harbert was paid $330.00 per week plus health, life, and dental insurance benefits worth an additional $69.90 per week. Following her termination, Mrs. Harbert sought other employment. In August 2001, she took the first job she was offered by Conoco. This job was at less pay than she had received from Healthcare. She was still employed by Conoco at the time of this trial. She has not missed a day of work at Conoco and her duties are at least and frequently more strenuous and physically demanding than those she performed while employed by Healthcare.

After signing the service agreement with Sunset Manor, Healthcare was entirely responsible for setting Mrs. Harbert's rate of pay, salary and benefits and had ultimate authority for hiring, transferring and terminating her. Mrs. Harbert was required to submit a variety of monthly reports to her district manager. The

district manager visited Sunset Manor once or twice each month and as his supervisor, the regional manager, visited the location an estimated three to six times during the entire time the agreement was in effect. Mrs. Harbert attended some of the monthly account manager meetings held by her district manager at the Golden offices.

Mrs. Harbert's supervisors at Healthcare were aware of, and directed her to comply with, the supervisory control and authority exercised over her by Sunset Manor's administrator, Kathy Mecklenburg. Healthcare approved of Ms. Mecklenburg's requiring Mrs. Harbert to attend Sunset Manor department head meetings. The regional manager testified that Healthcare preferred "that their account managers meet the expectations of the administrator of the facility." Both the district manager and the regional manager were aware that Mrs. Harbert regularly ordered supplies for and at the request of Sunset Manor that were outside stated obligations of the service agreement and neither objected.

The monthly report forms Mrs. Harbert used to report to the district manager did not include a place to describe assignments that might have been performed at the request of Sunset Manor but that were not included in the services agreement. Moreover, neither the district manager nor the regional manager ever inquired of Mrs. Harbert of the Sunset Manor administrator about such assignments. Thus, the district manager and the regional manager were unaware that Kathy Mecklenburg required Mrs. Harbert to clean facilities not included in the agreement, or other ultra-contractual assignments to drive the Sunset Manor shuttle van on a regular basis to Denver and back to Brush, to participate in the pick up of trash along an interstate highway along with Sunset Manor employees, to sell tickets for Sunset Manor and attend fund raising events or train, schedule and supervise Sunset Manor employees who were not subject to the Healthcare service agreement.

Both before and after Mrs. Harbert's nominal employer was changed from Sunset manor to Healthcare, Kathy Mecklenburg exercised direct, immediate and hands-on supervisory control over her. This control included setting Mrs.

Harbert's work schedule and hours, directing the manner of performance of her duties and the daily assignments of those working under Mrs. Harbert and requiring her to work nights and weekends.

Healthcare and Sunset Manor are entirely separate organizations. Neither has an ownership in the other nor have there ever been common officers or directors between the two. Sometime during the first two weeks of February, 1999, however, Kathy Mecklenburg told the district manager that she was very pleased with the account manager whim Mrs. Harbert had found to replace her during her leave and that she, Kathy Mecklenburg, would prefer that Mrs. Harbert not return to Sunset Manor.

Healthcare denies Meckleburg's preference had anything to do with Mrs. Harbert's termination and asserts that such a finding would be pure speculation. I need not make such a finding, but it would not be entirely speculative. Rather, it would be fair inference drawn from the proximity of the statement to the decision to terminate to conclude that, when coupled with her supervisory contacts with Mrs. Harbert, Mecklenburg's declaration influenced the decision.

I conclude Mrs. Harbert performed substantial services for both Healthcare and Sunset Manor. Mrs. Harbert was primarily employed by Healthcare to supervise and perform housekeeping and laundry services. At the direction and under the supervision and discipline of Sunset Manor's administrator, Mrs. Harbert was required to perform additional duties beyond those specified in the service agreement.

Some of these additional duties were known to Healthcare supervisors of Mrs. Harbert, and others, which were unknown to those supervisors were plainly recognizable and discoverable by even the slightest observation or enquiry. Moreover, Sunset Manor provided daily supervision, work scheduling and employment evaluation for Healthcare.

In determining the existence of a joint employer relationship under FMLA, I must use the economic realities test and focus on the employee rather than the legal relationship

between the employers. *See Harbert*, 173 F. Supp.2d at 1105-06. Given the totality of Mrs. Harbert's job circumstances, it is obvious that she could not work at Sunset Manor without the approval, direct supervision and coordinated control of that institution.

Healthcare argues that it had no knowledge of other activities that Mecklenburg directed Mrs. Harbert to perform. First, Mrs. Harbert had such knowledge and she was an employee of Healthcare. Second, Healthcare supervisors made site visits to Sunset Manor and such information was readily available to them. That they did not see what was plainly visible and failed to inquire is not a defense.

The predictable issue for appeal in this case is my previous ruling that the Department of Labor's regulation 29 C.F.R. Section 825.111(a)(3) is valid and enforceable. In my memorandum opinion, I held that the regulation providing that when a joint employment relationship exists, the employer's worksite is the primary employer's office from which the employee is assigned or reports to, is based on a permissible construction of the word "worksite" and therefore does not contradict the express terms of the FMLA. 173 F. Supp.2d at 1106. I continue to adhere to that ruling.

The decision by Healthcare that Mrs. Harbert was not covered by the FMLA was not made at the regional or district level of the company, but by the Benefits Administrator at the company's headquarters. That conclusion was based on the Benefits Administrator's determination that Mrs. Harbert was not employed at a worksite at which Healthcare employee 50 or more employees within a 75 mile radius. There is no evidence or argument to suggest that the Benefits Administrator even considered the subject regulation.

Mrs. Harbert is entitled to liquidated damages under 29 U.S.C. § 216(b). Defendants invoke the good faith defense at 29 U.S.C. § 260 to object that Mrs. Harbert should not be awarded liquidated damages because Healthcare denied coverage of the FMLA in good faith. The contention, however, is rejected. Section 260 provides that liquidated damages are recoverable

unless the employer shows that it acted in good faith and had reasonable grounds for believing that it did not violate the Act. *Generally, Renfro v. City of Emporia*, 948 F.2d 1529, 1540 (10th Cir.1991). There can be no reasonable grounds for believing Healthcare did not violate the Act when it paid no attention at all to the regulation. The second half of the equation is missing. A *post hoc* challenge to the validity of the regulation will not obviate consideration of it at the time benefits are denied.

It is therefore ORDERED that the plaintiff shall have judgment as follows: $399.00 dollars per week from the date of termination, February 16, 1999 to the date of this order, March 12, 2003 or $84,778.80 less the amount Mrs. Harbert has earned during the same period of time through other employment together with interest on the net amount at the legal rate, liquidated damages in the same amount and front pay in an amount equal to $399.90 per week from March 12, 2003 to February 12, 2008, her 65th birthday and the day she admittedly intended to retire or $102,374.40, reduced by the amount of compensation she would earn from Conoco during that time, calculated at her present rate of earnings per week plus any guaranteed raises or cost of living increases. I am specifically not ordering reinstatement rather than front pay because it would not be practicable under the circumstances of this case, the fact that Mrs. Harbert was replaced and the position she held involved personal concord which is not realistically obtainable.

In addition, Mrs. Harbert is awarded the cost of her reasonable attorney fees herein expended, expert witness fees, and other court costs pursuant to 29 U.S.C. § 2617 (a)(3). Counsel for both parties are hereby ORDERED to meet and confer withing 20 days from the date hereof to determine the precise amounts to be set forth in the judgment in accordance with the above stated findings and conclusions. If counsel can agree they shall prepare a judgment in accordance herewith. If counsel are unable to agree, they shall notify the court within the following ten days and the matters not agreed upon will be set for hearing. If attorney fees are not agreed upon, each party shall present expert testimony and the court will take evidence on determining a reasonable amount therefore. The cost of such hearing, including expert witness fess

shall be borne by the party whose amount differs most from the amount fixed by the court.

Dated this 13th day of March, 2003, at Denver, Colorado.

John L. Kane
U.S. Senior District Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NANCY E. HARBERT,

Plaintiff-Appellee,

v. No. 03-1156

HEALTHCARE SERVICES GROUP, INC., a Pennsylvania Corporation,

Defendant – Appellant,

ELAINE CHAO, Secretary of Labor,

Amicus Curiae.

ORDER

Filed March 2, 2005

Before **EBEL, KELLY,** and **McCONNELL,** Circuit Judges.

Appellee's petition for rehearing is denied. Judge Kelly has dissented.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the

court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

(signed)
By: _____
Deputy Clerk

APPENDIX D

Joint Employment Under FMLA, 29 C.F.R. § 825.106.

§ 825.106 How is "joint employment" treated under FMLA?

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its

employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the "primary" employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer.

(e) Job restoration is the primary responsibility of the primary employer. The second employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (*see* § 825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with *all* the provisions of the FMLA with respect to its regular, permanent workforce.

APPENDIX E

FMLA Eligibility Under 50/75 Provision, 29 C.F.R. § 825.111.

§825.111 In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed?

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, etc., the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as

the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent fro New Jersey continue to have the headquarters in New Jersey as their "worksite." The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the new concept of flexiplace. Rather, their worksite is the office to which the report and fro which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads,

highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are "maintained on the payroll" during any portion of the year when school is not in session. *See* § 825.105(c).

APPENDIX F

Warn Act Regulation Defining "Single Site of Employment,"
20 C.F.R. § 639.3(i)

. . .

(i) *Single site of employment.* (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under § 639.3(a).

(8) The term "single site of employment" may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable.

APPENDIX G

Senate Report No. 103-3, 103d Cong., 1st Sess., at 21-23,
Reprinted in 1993 U.S.C.C.A.N. 3, 23-25.

P.L. 103-3, FAMILY AND MEDICAL LEAVE ACT OF 1993

SENATE REPORT NO. 103-3
January 27, 1993

IV. COMMITTEE VIEWS

DEFINITIONS

The term "worksite" is intended to be construed in the same manner as the term "single site of employment" under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. 2101(a)(3)(B), and regulations under that Act (20 CFR Part 639). Where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salespersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report.

APPENDIX H

House of Representatives Report No. 103-8(1), at 33-35 (1993)

P.L. 103-3, FAMILY AND MEDICAL LEAVE ACT OF 1993

HOUSE REPORT NO. 103-8(I)
February 2, 1993

EXPLANATION OF THE BILL AND SECTION ANALYSIS

Definitions

The term "worksite" is intended to be construed in the same manner as the term "single site of employment" under section 2(a)(3)(B) the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. 2101(a)(3)(B), and regulations under that Act (20 CFR Part 639). Where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salespersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report.

(2)

No. 04-1647

Supreme Court, U.S.
FILED
JUL 7 - 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

NANCY E. HARBERT,

Petitioner,

v.

HEALTHCARE SERVICES GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is the Department of Labor's regulation defining "worksite," 29 C.F.R. § 825.111(a)(3), a valid and enforceable implementation of the FMLA as applied to a joint employee who has a fixed place of work?

CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation that owns 10% or more of the stock of Healthcare Services Group, Inc.

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CASE

Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 3, 8

REGULATIONS

29 C.F.R. § 825.106(a) 7

29 C.F.R. § 825.106(b) 7

29 C.F.R. § 825.106(e) 7

29 C.F.R. § 825.111(a)(3) 8, 9

RULE

Sup. Ct. R. 10 3

LEGISLATIVE HISTORY

H.R. Rep. No. 102-135, pt. 1 (1991) 4

H.R. Rep. No. 103-8, pt. 1 (1993) 5

S. Rep. No. 102-68 (1991) 4

S. Rep. No. 103-3 (1993) 5

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is confined largely to setting forth the nature of the case and the proceedings below. Healthcare does not take issue with that recitation, except for the representation at page 6 that Judge Kelly dissented in the denial of Harbert's Petition for Rehearing En Banc. As stated in the March 2, 2005 Order of the Tenth Circuit, that Petition was denied because "no member of the panel and no judge in regular active service on the court requested that the court be polled." App. C.

However, Petitioner's Statement of the Case fails to include numerous facts that are material to the consideration of the question presented. Those facts are set forth herein.

Healthcare provides housekeeping and laundry services to long-term care institutions on a contract basis. It employs approximately 17,000 employees and has contracts with about 1,300 long-term care facilities in 42 states. Organizationally, Healthcare is divided into regions, which are composed of multiple districts. Each district is made up of individual accounts, which are the long-term care institutions. App. A-2, 3.

Healthcare's Account Managers work at the account to which they are assigned and report to District Managers. District Managers report to Regional Managers. In Colorado, all District Managers and the Regional Manager had their offices at the same location in Golden, Colorado. App. A-3.

Sunset Manor is a convalescent/nursing facility located in Brush, Colorado, which is more than 75 miles from Golden. App. A-3. During all relevant times, Healthcare employed fewer than 50 employees within a 75 mile

radius of Sunset Manor. App. B-2. Healthcare and Sunset Manor are entirely separate organizations. Neither has an ownership interest in the other, nor have there ever been common officers or directors between the two. App. B-6.

In 1994, Harbert was hired by Sunset Manor as the Housekeeping Supervisor, and in 1995 her responsibilities were expanded to include the position of Laundry Department Supervisor. In 1997, Healthcare entered into an agreement to provide housekeeping and laundry services to Sunset Manor. Harbert's employment with Sunset Manor was transferred to Healthcare, and Harbert became the Account Manager for Healthcare's Sunset Manor account. Healthcare assumed all responsibility for retaining, transferring, or firing Harbert, and also paid her salary and provided her benefits. Harbert's duties, however, remained essentially the same as when she was employed directly by Sunset Manor. App. A-3.

Harbert worked an average of 50 to 55 hours per week out of an office at Sunset Manor. App. B-3. When she reported to her District Manager, she reported to him at Healthcare's Regional Office in Golden. Such reports were almost always by telephone or through the submission of written reports; Harbert went to the Golden office only for an occasional District meeting of Account Managers. App. A-3.

Sunset Manor's Administrator exercised direct, immediate, and hands-on supervisory control over Harbert when Harbert was employed by Sunset Manor, and this control did not change after Harbert became an employee of Healthcare. The Administrator's control included setting Harbert's work schedule and hours, directing the manner of performance of her duties and the daily assignments of those working

under Harbert, and requiring Harbert to work nights and weekends. App. B-5, 6.

Harbert believed that she had a long-term job at Sunset Manor and planned to work there until her retirement at age 65. App. A-3.

REASONS FOR DENYING THE WRIT

As is clear from Rule 10 of this Court's Rules, a petition for a writ of certiorari will be granted only for truly compelling reasons. The validity of the regulation at issue is a matter of first impression outside of the Tenth Circuit. Indeed, not only is there no conflict among the Circuit Courts of Appeal, but the *only* reported District Court decision on this issue is that of the trial court in this case.

Furthermore, it is undisputed that *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) sets forth the analysis and framework against which the regulation at issue must be measured, and that the Tenth Circuit did just that. In no way does the majority's opinion constitute "new law" with respect to the analysis used to determine whether an agency's construction of a statute which it administers is a permissible construction. And Rule 10 states specifically that a petition is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

The arguments advanced by the Petitioner in support of the writ fall far short of justifying the exercise of this Court's supervisory power. They will be addressed below. Before doing so, however, Healthcare wishes to make two observations.

First, none of the parties to this litigation, nor the majority or dissenting opinions, contest the "fixed" nature of Harbert's workplace, or the following facts:

- From 1994 until February of 1998, Harbert worked out of an office at Sunset Manor in Brush, Colorado.
- When Harbert reported to her Healthcare District Manager, she reported to him at Healthcare's Regional Office in Golden, Colorado. But such reports were almost always by telephone or through the submission of written reports; Harbert went to the Golden office only for an occasional District meeting of Healthcare Account Managers.
- Sunset Manor's Administrator exercised direct, hands-on supervision and control over Harbert when Harbert was employed by Sunset Manor, and this did not change after Harbert became an employee of Healthcare.
- Harbert believed that she had a long-term job at Sunset Manor and planned to work there until her retirement at age 65.

Second, with the several eligibility restrictions contained in the FMLA, the United States Senate estimated that only 40% of all U.S. employees would be covered by the Act (S. Rep. No. 102-68, at 24 (1991)), while the House put the figure at 50% (H. R. Rep. No. 102-135(I), at 37 (1991)).

I. The Dissent Is Premised Upon A Critical Flaw.

Much of the Petitioner's argument touts the wisdom of Judge Kelly's dissent. That dissent appears to be premised

upon the notion that there are "many variations in joint employment relationships," and that the Secretary's definition of "worksite" reflects Congress' instructions to take such variations into account.

> The legislative history reflects that the Senate and House obviously were aware of variations in joint employment relationships and directed the Secretary to construe "worksite" in the same manner as the term "single site of employment" under the WARN Act. S. R. Doc. No. 103-3, at 25[1] (1993); *see also* H. R. Doc. No. 103-8, pt. 1, at 35 (1993).

App. A-24.

The legislative history cited by the dissent is the passage from the Senate and House Committee Reports reproduced in the majority's opinion at App. A-16, 17 and in Appendices G and H.

> The term "worksite" is intended to be construed in the same manner as the term "single site of employment" under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. 2101(a)(3)(B), and regulations under that Act (20 C.F.R. Part 639). Where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salespersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report.

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[1] The reference to page 25 must be a typographical error. Page 23 is the correct citation.

This passage makes no mention whatsoever of joint employment, nor is joint employment mentioned in the "single site of employment" WARN Act regulations referred to in the passage.

Rather than accept this passage as demonstrating Congress' intention to distinguish between employees who have a fixed place of work and those who do not, as the majority has done, the dissent appears to equate the lack of a fixed workplace with joint employment. However, such a proposition does not withstand scrutiny. One need look no further than the Secretary's own definition of "joint employment" to see that the absence of a fixed workplace is not a prerequisite for being jointly employed:

> Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Where the employee performs work which simultaneously benefits two or more employers, *or* works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> (1) Where there is an arrangement between employers to share an employee's services or to interchange employees;
>
> (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,
>
> (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of

> the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 825.106(a) (emphasis added). App. D-1.

This is not to say, however, that an employee without a fixed worksite cannot be jointly employed. Indeed, the regulations use temporary or leasing agencies that supply employees to a second employer as an example (the only example) of a situation in which joint employment is likely to exist. 29 C.F.R. § 825.106(b). Employees who work for such agencies generally do not have a fixed worksite; they usually float from location to location. However, it should be obvious that not every employee who is deemed to be jointly employed also has no fixed worksite. Harbert is a perfect example of this.

To summarize, it simply is not accurate to state that, in passing the FMLA, Congress was aware of variations in joint employment relationships and intended the Secretary to take those variations into account in promulgating regulations defining "worksite."[2]

---

[2] There is one other passage in the dissent which is not accurate and merits specific attention. At App. A-24, the dissent states:

> Basing FMLA eligibility on primary employers prevents confusion and provides certainty, because a temporary placement employee's coverage could vary daily were he placed in different convenience stores on a rotating basis.

First, under the majority's decision, the eligibility of an individual who works at a fixed workplace, but who is jointly employed, is still dependent upon the primary employer, i.e., whether the primary employer employs 50 or more employees within 75 miles of the workplace of the individual in question. *See* 29 C.F.R. § 825.106(e) which makes it clear that job restoration is the responsibility of the primary employer.

(Continued on following page)

II. The Majority's Opinion Will Not Lead To Greater Uncertainty Or Illogical Or Inconsistent Results.

The majority's opinion stands as a model in organization, logic, and clarity. After setting forth the framework that it will use (*Chevron*), the majority states that Congress did not clearly express its intent with respect to the meaning of "worksite" for an employee who is jointly employed. Accordingly, the Court must apply the second step of *Chevron*, i.e., whether the regulation is arbitrary, capricious, or manifestly contrary to the FMLA.

Stating its conclusion that, as applied to a jointly employed employee with a fixed place of work, the regulation is not valid, the balance of the majority's opinion lays out the three indicia of Congressional intent that led to its conclusion (i.e., (1) the common meaning of the term "worksite;" (2) the purpose of the FMLA, with particular attention to the so-called 50/75 provision; and (3) the arbitrary distinction between sole and joint employers in light of the 50/75 provision (which provision contains no suggestion that joint employment should be treated differently)), followed by several pages (App. A-16 to A-21) addressing specifically, and in great detail, each of the counter-arguments that were presented by the Secretary and the Petitioner.

Second, a temporary placement employee who is placed in different convenience stores on a rotating basis clearly has no fixed workplace. Accordingly, under the majority's decision, that employee's FMLA eligibility would still be governed by 29 C.F.R. § 825.111(a)(3), i.e., the employee's "worksite" is the primary employer's office from which the employee is assigned or reports. Hence, that employee's FMLA coverage would *not* vary daily.

No purpose would be served by repeating those points here, and they squarely rebut Petitioner's assertion that the majority's opinion will lead to illogical or inconsistent results.[3] Petitioner's contention that the majority's decision will lead to "greater uncertainty" was not, however, addressed by the majority. This contention appears to be based upon a purported difficulty in distinguishing between a "fixed worksite" and a "non-fixed worksite":

> The majority deemed Ms. Harbert's assignment to Sunset Manor to be "fixed" as compared to an employee of a temporary help agency who, according to the majority, "does not have a permanent, fixed worksite." *Harbert*, 391 F.3d 1153. What then is a "fixed" worksite as compared to a non-fixed worksite? Can a non-fixed worksite become "fixed" if the employee works at that worksite long enough? What about an employee of a temporary help agency who receives a long-term assignment? Would that employees' place of work be considered "fixed;" or does the mere fact that the employee was employed by a temporary help agency make her worksite "non-fixed"? Is the "fixed" or "non-fixed" nature of the joint employee's assignment determined by the joint employer's type of business? The distinction is anything but clear.

Petition, p. 10.

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[3] Before leaving the subject of "logic," what if Healthcare actually did have more than 50 employees within 75 miles of Sunset Manor, so that it could take advantage of their geographic proximity to temporarily fill-in for Harbert while she was out of work, but Healthcare's Regional Office from which Harbert was assigned or reported did not have 50 employees within 75 miles. Pursuant to § 825.111(a)(3), because Harbert was jointly employed by two employers, she would *not* be entitled to FMLA leave. Would such a result make any sense whatsoever given the clear purpose of the 50/75 provision?

The simple response to Petitioner is that it was Congress that chose the phrase "fixed worksite" (in both the Senate and House Committee Reports), and it was Congress that decided that there would be a difference in the treatment between those who had a "fixed worksite" and those who did not. (Conversely, Congress did not make any distinction between being solely employed or being jointly employed.) Hence, even assuming for the sake of argument that the distinction between "fixed" and "non-fixed" is a difficult distinction to make, it is a distinction the making of which Congress has mandated.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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